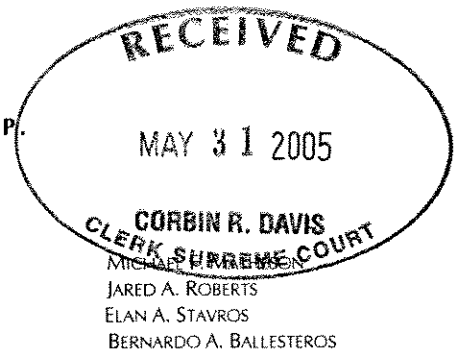


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May 31, 2005

VIA HAND DELIVERY

Michigan Supreme Court
c/o Corbin R. Davis, Esq., Clerk
925 West Ottawa
Lansing, Michigan 48915

RE: ADM File No. 2003-62, Proposed MRPC 6.5

We are writing on behalf of the Michigan Association of REALTORS® (the "Association") to comment on proposed Michigan Rule of Professional Conduct ("MRPC") 6.5, entitled "Nonprofit and Court-Annexed Limited Legal Services Programs" (the "Proposed Rule"). The Court should not adopt the Comment to the proposed MRPC 6.5 in its present form because, contrary to the apparent intent of the drafters and otherwise applicable Michigan law, the Comment would create a *per se* rule for attorney-client relationships where none is needed or advisable, and make the operation of many legal hotlines difficult if not impossible.

Our firm represents the Association, Michigan's largest non-profit trade association. As part of that representation, the firm operates for the Association, a private legal hotline as a benefit for Association members (the "MAR Legal Hotline"). The MAR Legal Hotline is available only to Association members. The MAR Legal Hotline has been maintained for 18 years.

Our firm provides the MAR Legal Hotline to serve as a legal reference for the Association's members. Association members may call the MAR Legal Hotline to obtain general information about legal matters from an attorney. As an example, approximately 25% of the calls to the MAR Legal Hotline relate to the law regarding the proper handling of buyers' earnest money deposits. Thus, the maintenance of the MAR Legal Hotline serves the public interest by educating members of the real estate profession so that they can better serve the buying and selling public. If a caller requires representation in a transaction, or the nature of the advice would involve the representation of a party to the transaction, and not the limited information the hotline can provide, he or she is advised to hire an attorney, as the MAR Legal Hotline cannot provide that representation.

In short, because of the nature of the service, the MAR Legal Hotline does not provide legal representation. Unfortunately, the Comment to proposed MRPC 6.5 suggests that all legal hotlines provide legal representation, and must therefore observe additional obligations that a lawyer-client relationship entails.

The Proposed Rule provides in pertinent part:

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides *short-term limited legal services* to a client . . . :^[1]

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified

(b) Except as provided in paragraph (a)(2), Rule 1.10^[2] is inapplicable to a representation governed by this Rule. [Proposed MRPC 6.5 (emphasis added).]

The proposed Comment to the Proposed Rule states in part:

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. *In these programs, such as legal-advice hotlines, . . . a client-lawyer relationship is established, but there is no expectation that the*

¹ The Association is a nonprofit organization. Although it does not do so, if the Association hotline could be construed as rendering "short-term limited legal services," the Proposed Rule arguably applies.

² Proposed MRPC 1.7, 1.9(a), and 1.10 all relate to conflicts of interest.

lawyer's representation of the client will continue beyond the limited consultation. . . .

[2] A lawyer who provides short-term legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. . . . [Proposed MRPC 6.5 and Rule Comment (emphasis added).]

The Comment thus unequivocally states that an attorney-client relationship is automatically created over a legal hotline. Elsewhere the Model Rules state that the formation of an attorney-client relationship is governed by substantive law only, not the Model Rules. See current and proposed Michigan Rules of Professional Conduct (MRPC), Scope, § 17. Whether the relationship forms is a question of fact, decided on case-by-case basis. See generally *id.* According to the proposed MRPC, a client relationship forms and most client-lawyer duties "attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so." Scope, § 2. Under applicable Michigan law, "[t]he rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship." *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11; 564 NW2d 457 (1997). See also *Dressel v Ameribank*, 468 Mich 557, 566; 664 NW2d 151 (2003).

It would appear that the drafters of proposed MRPC 6.5, which is based on the ABA Model Rules of Professional Conduct, were attempting to facilitate the operation of legal hotlines by relieving them of certain obligations. See Proposed Rule Comment and Supreme Court Staff Comment. The opposite result might be reached if portions of the Comments are adopted: (1) the Proposed Rule Comment, § 1, statement that an attorney-client relationship is automatically formed through a legal hotline; and (2) the Proposed Rule Comment, § 2, imposition of an additional obligation on legal hotlines to obtain informed consent to the limited representation from each caller. This obligation should not be required where there is no representation, limited or otherwise, and is not feasible with a hotline like the MAR Legal Hotline.

Our primary objection to the Proposed Rule is the statement in Comment, § 1, that a legal hotline phone consultation automatically results in an attorney-client relationship. Our firm represents the Association, thus we only can have an attorney-client relationship with the Association, not the Association members when calling the MAR Legal Hotline. See current and proposed MRPC 1.13(a). Members of the Association have historically been advised that there is no attorney-client relationship between the attorney providing information over the MAR Legal Hotline and a member caller.

This issue may affect other legal hotlines. The Supreme Court Staff Comment to Proposed Rule MRCP 6.5 lists as an example of such a legal service program "Help Desks in courthouses." We would suspect that it is unlikely the providers of such a service, or for that matter, the callers to such a "Help Desk," believe that an attorney-client relationship is established during each call. As noted above, the nature of the service and representation provided by a legal hotline or "Help Desk" will determine whether they wish to, or may, form an attorney-client relationship with callers.

An ethical rule cannot change precedential common law that already establishes that the formation of an attorney-client relationship is determined on a case-by-case basis. See current and proposed MRPC, Scope, § 17 (stating that the formation of an attorney-client relationship is governed by substantive law, not the MRPC); see also *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11; 564 NW2d 457 (1997) ("[t]he rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship"), and *Dressel v Ameribank*, 468 Mich 557, 566; 664 NW2d 151 (2003) ("a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and *profound* legal knowledge") (emphasis added).

We note that over the eighteen years the MAR Legal Hotline has been maintained, there has never been a claim or issue that the service provides anything other than reference information. The MAR Legal Hotline provides callers with information as to relevant statutes and rules governing the operation of their business. The information provided to callers does not form the basis of an attorney-client relationship. The Comment's characterization of all hotlines suggests that they necessarily provide "short-term legal services." In this sense, the Comment injects a new issue where none existed and is not warranted by the rule itself.

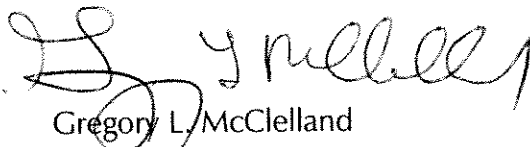
A second objection to the Comment to the Proposed Rule arises from the informed consent provision, Comment, § 2, (assuming that the first Comment is retained). This section provides that "[a] lawyer who provides short-term legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation." Assuming an attorney-client relationship is formed during a hotline consultation, obtaining informed consent, practically speaking, would require a writing. This would not be feasible with every caller on a legal hotline service. In addition, in the case of the MAR Legal Hotline, many, if not most, of the callers to the hotline are salespeople who are, legally, calling on behalf of their broker entity. Typically, salespeople do not have the authority to grant an "informed consent" to a short-term limited attorney-client relationship. Further, it is not clear how this firm would determine as a practical matter whether a particular caller is authorized to grant an "informed consent" on behalf of a brokerage firm.

Of course, the informed consent provision would only be objectionable should this Court choose to maintain a rule, suggested by the first Comment, establishing an automatic attorney-client relationship for legal hotlines. If this Court strikes the attorney-client relationship provision, our objection to the informed consent provision would be withdrawn.

In conclusion, the reference to an attorney-client relationship in the Comment to proposed MRPC 6.5 should be stricken or rewritten. For example, the language at issue easily could be rewritten as follows: "In these programs, such as legal-advice hotlines, . . . a client-lawyer relationship *may or may not be established under common law . . .*" (New language in italics.) This language would allow legal hotline operators and the public to rely on the precedential common law test already in place for the establishment of an attorney-client relationship. Then, the purpose of the Proposed Rule – i.e. "to improve the provision of basic legal services to the public" – would be served. Proposed MRPC 6.5, Supreme Court Staff Comment.

Thank you for your consideration of these comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gregory L. McClelland".

Gregory L. McClelland

A handwritten signature in black ink, appearing to read "Elan A. Stavros".

Elan A. Stavros

GLM/eas

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